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Supreme Court, U.S.
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APR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1857

In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL BANK INTERNATIONAL, APPELLANT

v.

CITY OF NEW YORK, DEPARTMENT OF FINANCE

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether state and local taxes may be imposed on branches of out-of-state corporations that are organized under the Edge Act, 12 U.S.C. 611-632.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	5
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bank of California v. *Richardson*, 248 U.S. 476 (1919) ... 11
Clarke v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987) ... 16
Container Corp. of America v. *Franchise Tax Board*, 463 U.S. 159 (1983) ... 19
Department of Employment v. *United States*, 385 U.S. 355 (1966) ... 6, 7
Exxon Corp. v. *Department of Revenue*, 447 U.S. 207 (1980) ... 19
First Agricultural Nat'l Bank v. *State Tax Comm'n*, 392 U.S. 339 (1968) ... 6, 7, 8
First Nat'l Bank v. *Missouri*, 263 U.S. 640 (1924) ... 16
Lowry Nat'l Bank, 29 Op. Att'y Gen. 81 (1911) ... 16
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) ... 7
Merchants' Bank v. *State Bank*, 77 U.S. (10 Wall.) 604 (1870) ... 16
Mobil Oil Corp. v. *Commissioner of Taxes*, 445 U.S. 425 (1980) ... 19
Owensboro Nat'l Bank v. *Owensboro*, 173 U.S. 664 (1899) ... 7
Railroad Co. v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873) ... 6
Standard Oil Co. v. *Johnson*, 316 U.S. 481 (1942) ... 6
United States v. *New Mexico*, 455 U.S. 720 (1982) ... 5, 7, 9

Constitution, statutes and regulations:

U.S. Const.:
Art. VI, Cl. 2 (Supremacy Clause) ... 5
Amend. XIV (Due Process Clause) ... 19

Statutes—Continued: Page

Edge Act, 12 U.S.C. 611-632 1
12 U.S.C. 611 1
12 U.S.C. 615(a) 1
12 U.S.C. 615(b) 1, 13, 14, 15, 16
12 U.S.C. 616 1
12 U.S.C. 627 ..... *passim*
International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 2
§ 3, 92 Stat. 608 2
§ 3(a), 92 Stat. 608 18
§ 3(b), 92 Stat. 608 18
§ 4, 92 Stat. 612 18
Rev. Stat. § 5219 (1875 ed.) (formerly 12 U.S.C. (1964 ed.) 548) 8, 12
12 U.S.C. 36 8
12 U.S.C. 548 8
N.Y. City Admin. Code §§ 11-368 *et seq.* (formerly § R46-37.1) 3
12 C.F.R. 211.4(c) 2
12 C.F.R. 211.6(a) (1978) 2
Federal Reserve Board Reg. K § VIII (Mar. 23, 1920) 2

Miscellaneous:

58 Cong. Rec. (1919):
p. 4955 ..... 9, 10
p. 4956 10
p. 4969 ..... 9, 10, 11, 17
p. 5075 11
p. 7854 14
p. 7856 14
p. 7857 ..... 14, 15
p. 8083 ..... 6, 8, 13
p. 8084 6
p. 8086 6
p. 8089 ..... 6, 8
p. 8100 14
p. 8102 15

Miscellaneous—Continued: Page

p. 8107 12
pp. 8107-8108 12
p. 8108 12

59 Cong. Rec. (1919):
p. 49 ..... 13, 15, 16, 18
p. 51 6
p. 52 6
p. 111 15

Hearing on S. 2472 Before the House Comm. on Banking and Currency, 66th Cong., 1st Sess. (1919) 12

Hearings on S. 2472 Before the Senate Comm. on Banking and Currency, 66th Cong. 1st Sess. (1919) 14

H.R. Conf. Rep. 473, 66th Cong., 1st Sess. (1919) 13

Kelly, *Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks*, 20 Va. J. Int'l L. 37 (1979) 18

S. Rep. 108, 66th Cong., 1st Sess. (1919) 6, 14

S. Rep. 986, 67th Cong., 4th Sess. (1923) 10

S. Rep. 91-530, 91st Cong., 1st Sess. (1969) 8

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Edge Act (the Act), 12 U.S.C. 611-632, enacted in 1919, permits the creation of federally-chartered corporations to engage in "international or foreign banking or other international or foreign financial operations" (12 U.S.C. 611). These so-called "Edge corporations" are authorized to discount notes, make loans, accept deposits, and engage in a range of other banking functions (see 12 U.S.C. 615(a)), although their activities must be "incidental to [their] international or foreign business" (12 U.S.C. 616). The Act also provides, in Section 615(b), that Edge corporations may "establish and maintain for the transaction of [their] business branches or agencies in foreign countries, their dependencies or colonies, and in the

dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System [the Board]." Pursuant to this provision, the Board in 1920 promulgated its Regulation K, which in its original form permitted an Edge corporation to establish "[a]gencies * * * in the United States * * * for specific purposes, but not generally to carry on the business of the Corporation" (§ VIII (Mar. 23, 1920)); at the same time, Regulation K barred Edge corporations from establishing *branches* in the United States. See 12 C.F.R. 211.6(a) (1978).

In 1978, Congress enacted the International Banking Act (IBA), Pub. L. No. 95-369, 92 Stat. 607, which made several amendments to the Edge Act. Among other things, Section 3 of the IBA, 92 Stat. 608, directed the Board to revise its Edge Act regulations to eliminate or modify those provisions that unnecessarily disadvantaged Edge corporations. In response to this mandate, the Board revised its Regulation K to eliminate the bar on domestic branching by Edge corporations. In its current form, Regulation K provides that "Edge Corporation[s] may establish branches in the United States" with the Board's approval. 12 C.F.R. 211.4(c).

From the time of its enactment, the Edge Act has also contained a provision permitting state taxation of Edge corporations. The first sentence of Section 627 of the Act provides that an Edge corporation "shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business." The second sentence of the provision makes the shares of stock of Edge corporations taxable as personal property of the shareholders. Section 627 was not modified by the 1978 amendments and remains in effect.

2. Prior to 1980, during the period when Regulation K barred branching by Edge Corporations, the Continental Illinois National Bank and Trust Company of Chicago (Continental Illinois) owned three separately incorporated Edge corporations that were domiciled in New York, Florida, and Texas. During this period, Continental Illinois' New York Edge corporation paid taxes to New York City pursuant to the City's Financial Corporation Tax, which imposes an annual levy on every "banking corporation" doing business in the City. See § R46-37.1 of the Administrative Code of the City of New York, now codified at §§ 11-368 *et seq.* Following the revision of Regulation K, however, Continental Illinois dissolved its separate Edge corporations and incorporated appellant, Continental Bank International, as an Edge corporation with its home office in Illinois. Appellant, in turn, established branches in various locations around the country, including New York City. J.S. App. C2-C3. Appellant then maintained that it could not be subject to the New York City tax because, it asserted, under 12 U.S.C. 627 an Edge corporation may be taxed only by the state in which it maintains its home office. When City authorities rejected this contention (J.S. App. C1-C17), appellant paid the tax under protest and sought judicial relief (see *id.* at A4).

The Appellate Division of the New York State Supreme Court upheld the City's authority to tax appellant (J.S. App. B1-B2), and that determination was in turn affirmed by the New York State Court of Appeals (*id.* at A1-A10). The Court of Appeals first found that the language of Section 627 contains "no plain authorization or prohibition of taxation by States of [Edge corporation] branch offices" (J.S. App. A5). With this in mind, the court then determined (*id.* at A5-A6) that,

> [i]nasmuch as the statutory scheme of the Edge Act did not authorize branch offices in the United States

> (*see*, 12 USC § 615[b]) and the possibility of such offices was decried by some of the original enactors (58 Cong Rec 7856-7857), it stands to reason that the authorization of full nondiscriminatory taxation by the home office State (12 USC § 627) was not an expression of immunity for then nonexistent branch offices. Instead, Congressional debate indicated a purpose to subject Edge Act banks to State taxation (58 Cong Rec 4969).

The court therefore concluded that "an intention of Congress to deny the State's power to tax Edge Act bank branches cannot be inferred from the language of the statute, which is at best ambiguous on that subject, or from the surrounding debates which indicate only an intent to subject Edge Act banks to State taxation" (*id.* at A6).

The Court of Appeals next held that Edge corporations are not constitutionally immune from state taxation as federal instrumentalities. On this, the court first found it unclear whether national banks retain their status as federal instrumentalities, and the court therefore labeled "problematic" the argument "that Edge Act banks are Federal instrumentalities because they are analogous to national banks" (J.S. App. A7). Instead, the court grounded its decision on the nature of Edge corporations, finding that "Edge Act banks receive no financial assistance from the Federal Government. The Federal Government does not rely on Edge Act banks to perform a traditionally governmental act. Rather, the Government relies upon the banks' separate profit motivation which propels the banks toward a mutually satisfactory end." *Id.* at A9 (citations omitted). For these reasons, the court concluded that Edge corporations and their branches are not constitutionally immune from state taxation in the absence of express congressional authorization.

DISCUSSION

There are two questions in this case: whether Edge corporations are federal instrumentalities that are immune from state taxation in the absence of express congressional authorization and, if not, whether Section 627 nevertheless precludes the taxation of an Edge corporation by states other than the one in which the corporation's home office is located. Because the court below answered both of these questions correctly, plenary review of this case is unnecessary.

1. We think it clear that Edge corporations are not federal instrumentalities that are immune from state taxation under the Supremacy Clause. Such a tax immunity is appropriate only "when the [state] levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982). As Justice Marshall has explained, the Court has looked at a variety of factors to determine whether an instrumentality meets this test:

> whether it is organized for private profit, and whether the Government has retained such control over it that "it could properly be called a 'servant' of the United States in agency terms"; whether it was organized to effectuate a special governmental program; whether its ownership, substantially or totally, lies in the Government; whether government officials handle and control its operations; whether its officers or any significant portion of them are appointed by the Government; whether the Government gives it significant financial aid, whether it is charged by law with carrying out some of the Government's international

> commitments, and whether it performs "functions indispensable to the workings" of a governmental unit.

First Agricultural Nat'l Bank v. *State Tax Comm'n*, 392 U.S. 339, 353-354 (1968) (citations omitted) (Marshall, J., dissenting).

Edge corporations have virtually none of these characteristics. As the drafters of the Edge Act emphasized, Edge corporations are private entities (see 58 Cong. Rec. 8083 (1919) (remarks of Rep. Phelan); *id.* at 8089 (remarks of Rep. Wingo); 59 Cong. Rec. 51, 52 (1919) (remarks of Rep. Wingo); *id.* at 52 (remarks of Rep. Platt)); they are given federal charters simply to make them more competitive abroad and to facilitate oversight by the Federal Reserve Board. See S. Rep. 108, 66th Cong., 1st Sess. 2 (1919); 58 Cong. Rec. 8083 (1919) (remarks of Rep. Phelan); *id.* at 8084, 8086 (remarks of Rep. Platt).[1] While Edge corporations are of course subject to federal regulation, they operate for profit under the direction of private officers. They receive no federal financial assistance, and the government is not liable for their obligations. And Edge corporations do not satisfy national treaty obligations or perform other uniquely governmental functions. Compare *Department of Employment* v. *United States*, 385 U.S. 355, 359 (1966); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484-485 (1942). Such entities can hardly be regarded as instrumentalities that are "virtually * * * an

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[1] In any event, the simple fact that an institution is chartered by the federal government does not make it a federal instrumentality. See, *e.g.*, *Railroad Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873). "Similarly, a whole host of businesses and institutions are subject to extensive federal regulation and that has never been thought to bring them within the scope of the 'federal instrumentalities' doctrine." *First Agricultural Nat'l Bank*, 392 U.S. at 354-355 (Marshall, J., dissenting).

arm of the Government." *Department of Employment*, 385 U.S. at 359-360 (footnote omitted).

Appellant makes no serious attempt to demonstrate that Edge corporations satisfy the tax immunity test set out in *United States* v. *New Mexico, supra*. Instead, it argues (J.S. 18-20) that such corporations should be deemed federal instrumentalities by analogy to national banks, which the Court long ago held to be instrumentalities that (at least in some respects) are immune from state taxation. See, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664 (1899). In fact, however, it is far from clear that national banks retain the characteristics that led the Court during the last century to hold them immune from state taxation. The Second Bank of the United States, whose operations were at issue in *M'Culloch*, was in part owned and directed by the United States and acted as the fiscal agent of the federal government; the national banks at issue in *Owensboro* acted as the agents for issuance of federal currency. See *First Agricultural Nat'l Bank*, 392 U.S. at 355-356 (Marshall, J., dissenting). Today, in contrast, it is the Federal Reserve banks—not the privately-owned national banks—that issue currency and serve as the federal government's fiscal agent. See *id.* at 356-358 (Marshall, J., dissenting).

For this reason, the last time that the Court was presented with the issue it expressly did not decide "the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities." *First Agricultural Nat'l Bank*, 392 U.S. at 341. And the three Justices who addressed the issue concluded flatly "that in light of the present functions and role of national banks they should not in this day and age be considered constitutionally immune from nondiscriminatory state taxation" (*id.* at 349 (Marshall, J., dissenting)).

There accordingly is some force to the Court of Appeals' conclusion that appellant's argument by analogy to national banks is "problematic" (J.S. App. A7).[2]

In any event, even if precedent would compel the Court to conclude today that national banks should be treated as federal instrumentalities, that rule should not be extended to Edge corporations. Those corporations are not national banks; if they were, they would have no general right to branch across state lines at all. See 12 U.S.C. 36. And the drafters of the Edge Act recognized that Edge corporations were less "governmental" in nature than the national banks of that era. See, *e.g.*, 58 Cong. Rec. 8083 (1919) (remarks of Rep. Phelan); *id.* at 8089 (remarks of Rep. Wingo). In these circumstances, there is no reason for the Court to depart from current tax immunity doctrine by

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[2] The Court held in *First Agricultural Nat'l Bank* that 12 U.S.C. (1964 ed.) 548, which expressly permitted certain limited state taxes on national banks, "was intended to provide the only ways in which States can tax national banks" (392 U.S. at 343); the Court concluded from the provision's legislative history "that if a change is to be made in state taxation of national banks, it must come from the Congress, which established the present limits" (*id.* at 346). Congress made that change the following year, providing that, "[f]or the purposes of any tax law enacted under authority of * * * any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. 548. In making this change, the Senate committee observed that "[t]here may at one time have been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal Government * * *. Without specifically addressing the question whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. 91-530, 91st Cong., 1st Sess. 2 (1969).

granting the benefits of federal instrumentality status to private entities that plainly have not been " 'incorporated into the government structure' " (*New Mexico*, 455 U.S at 737 (citation omitted)).

2. This leaves the second, and in our view more difficult, question here: whether Section 627, whose first sentence provides that an Edge corporation "shall be subject to tax by the State within which its home office is located," precludes taxation by states *other* than the one in which the corporation is domiciled. This language, which is permissive—and which does not in terms permit taxation *only* by the home office state—does not squarely resolve the question. And the legislative history of Section 627 is in important respects painfully opaque. On balance, however, we think that the congressional intent, when read against the background of other provisions of the statute, indicates that the court below ruled correctly in holding that Section 627 does not have a preclusive effect.

a. As originally introduced in the Senate, the Edge Act did not contain a provision providing for state taxation of Edge corporations. In explaining this omission, the Act's principal sponsor, Senator Edge, explained: "I thought and lawyers feel, many of them at least, that a corporation organized under this act would be taxed in every way that any other similar corporation is taxed if there is nothing said to the contrary. In other words, we define it when we exempt, and when we do not define it they are not exempted." 58 Cong. Rec. 4969 (1919). See *id.* at 4955 (remarks of Sen. Edge). Other senators agreed that "if nothing is said about it, under the ordinary operation of the tax laws, the tax that [Edge corporations] ought to pay will be imposed by laws already existing" (*id.* at 4969 (remarks of Sen. Smith)). See *ibid.* (remarks of Sen. Norris); *ibid.* (remarks of Sen. Smoot).[3] Senator Edge

[3] At least one Senator did suggest that Edge corporations might be immune from state taxation as federal instrumentalities. See 58 Cong.

nevertheless acquiesced in the addition of a proposed amendment addressing the taxation question, stating that "we want to make it doubly sure, and inasmuch as no one wants [Edge corporations] to escape any taxation, State or Federal, I am entirely satisfied to have language inserted to make it clear" (*ibid.*). See *id.* at 4955 (remarks of Sen. Edge); *id.* at 4969 (remarks of Sen. Smoot). This amendment was thus intended "to draw specific attention" to the taxability of Edge corporations (*id.* at 4956 (remarks of Sen. Edge)).

As originally proposed by Senator Gronna, this amendment, the predecessor to Section 627, provided in terms only for the imposition of federal taxes upon Edge corporations. This language prompted a general objection

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Rec. 4969 (1919) (remarks of Sen. Smith). Senator Edge, however, expressly and firmly rejected the suggestion that Edge corporations would be immune from state taxation as "fiscal agent[s] of the Government" (*id.* at 4955 (colloquy between Sens. Edge and Cummins)). Indeed, it was unclear to a roughly contemporaneous Congress whether the immunity even of national banks from state taxation rested on constitutional grounds rather than on preemptive legislative action:

> There are three possible theories of the relation of Congress to State taxation of national banks or shares therein: (1) That the plenary power of the State to tax may be restricted by Congress in order to protect an agency of the Federal Government from taxation deemed hostile or injurious; (2) that the powers of State and Nation are concurrent and that Congress may therefore restrict the State in virtue of Federal supremacy; and (3) that the State has no power except such as has been delegated by Congress. The committee does not deem it necessary to discuss the relative merits of these theories.

S. Rep. 986, 67th Cong., 4th Sess. 3 (1922). It appears that only one Senator expressed serious reservations about the imposition of state taxes on Edge corporations. See 58 Cong. Rec. 4969 (1919) (remarks of Sen. Owen); cf. *ibid.* (colloquy between Sens. Smith and Norris).

that the corporations were also to be subject to state taxation. See 58 Cong. Rec. 4969 (1919) (colloquy between Sens. Norris and Gronna); *ibid.* (remarks of Sen. Smoot); *ibid.* (remarks of Sen. Norris); *ibid.* (remarks of Sen. Gronna). The amendment accordingly was itself amended to make Edge corporations taxable "the same as member banks of the Federal Reserve System" (*ibid.*). This language was seen as desirable on the view that Edge corporations "ought to be taxed like any other banks. There ought to be no exemption about it. If they are located in New York they get the protection of the laws of New York, and they ought to be required to pay a tax to the State of New York the same as any other corporation doing business in that State" (*ibid.* (remarks of Sen. Norris)).[4] The amendment passed the Senate in this form (*id.* at 5075).[5]

When the Edge Act passed to the House for consideration, the Federal Reserve Board objected to what it regarded as the ambiguous language of the Gronna amendment. The Board noted that "member banks" may be either state or national banks, which at the time were subject to different degrees of state taxation (see n.4, *supra*);

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[4] There was some confusion expressed on the Senate floor about the nature of the state taxes imposed on member banks. State-chartered banks that were members of the Federal Reserve system were of course fully taxed; national member banks were taxed only to the extent permitted by Congress. See *Bank of California* v. *Richardson*, 248 U.S. 476, 483 (1919); p. 7, *supra*. When the amendment was adopted, however, it plainly was the Senate's understanding that "[a]ll member banks are taxed under the State laws." 58 Cong. Rec. 4969 (1919) (remarks of Sen. Norris); see *ibid.* (remarks of Sen. Gronna).

[5] Prior to passage, Senator Gronna proposed yet another modification that would have made express reference to state tax laws; this amendment was passed over and was never put to a vote. See 58 Cong. Rec. 4969 (1919).

the Board therefore proposed making Edge corporations taxable "to the same extent as national banking associations." *Hearing on S. 2472 Before the House Comm. on Banking and Currency*, 66th Cong., 1st Sess. 105 (1919) (statement of George L. Harrison). Without explanation, however, the House Committee on Banking and Currency discarded both the Senate and Board versions, substituting the current language of Section 627, along with a proviso to the statute's second sentence stating that shares of Edge corporation stock "owned by nonresidents of any State" would be taxable "only in the city or town in which the corporation's home office is located, and not elsewhere." 58 Cong. Rec. 7854, 8107 (1919).

Although the House debate on this amendment has elements of ambiguity, it apparently was directed only at the desirability of the nonresident share proviso. See 58 Cong. Rec. 8107-8108 (1919).[6] The House ultimately

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[6] Most of the House debate clearly concerned only the proviso. Appellant relies (J.S. 15-16) in large part on a statement made by Representative Wingo that "[t]he Supreme Court of the United States and the different courts have interpreted this language. It is copied verbatim from the national banking act. In other words, we are going to make these [Edge] corporations and their stock to be taxed exactly in the same manner as national banks and their stock are taxed" (58 Cong. Rec. 8108 (1919)). Appellant reads Representative Wingo's remark to mean that Section 627 was modeled on Rev. Stat. § 5219 (1875 ed.) (formerly codified at 12 U.S.C. (1964 ed.) 548), a provision of the National Bank Act that set out the exclusive means by which states could tax national banks. But even that remark was probably directed only at the proviso; the general context in which it was made related to the proviso only, and it was the proviso—not the other portion of the House amendment that became Section 627—that was borrowed virtually verbatim from Rev. Stat. § 5219 (which provided that "the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank

passed the amendment, including the nonresident share proviso. In conference, however, the proviso was dropped at the request of the Senate conferees. See H.R. Conf. Rep. 473, 66th Cong., 1st Sess. 3 (1919); 59 Cong. Rec. 49 (1919). The rest of the House amendment was approved by the Senate without objection and was enacted as Section 627.

b. The argument that Section 627's express authorization of taxation by the home office state precludes taxation by other states would obviously be strengthened by evidence that the drafters of the Act expected Edge corporations to conduct interstate operations. There is only scant evidence of this, however. To the contrary, Section 615(b) authorizes Edge corporations to maintain "branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States," and this provision plainly could have been read as prohibiting, by negative implication, the operation of agencies or branches in the United States. Again, however, the legislative history leaves some doubt about Congress's expectations.

Section 615(b) was introduced in its current form by Senator Edge and passed the Senate without discussion; it was described simply as a provision allowing Edge cor-

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is located, and not elsewhere)." Conversely, Representative Phelan stated in debate that "we want to place corporations organized under the national banking law on the same footing as corporations organized under the State laws. * * * This section was intended to prevent discrimination by the States in the taxation of a corporation organized under this law." 58 Cong. Rec. 8083 (1919). This statement, which suggests that Edge corporations should be treated like state-chartered corporations for tax purposes, seemingly cuts against appellant's argument that Edge corporations should be relieved from most state taxation. Again, however, the context of the debate suggests that Representative Phelan may have been referring only to the taxation of shareholders.

porations " 'to establish branches in foreign countries.' " S. Rep. 108, *supra*, at 2 (quoting letter from Federal Reserve Board).[7] When the bill passed to the House, the Banking and Currency Committee proposed amending Section 615(b) to allow the establishment by Edge corporations of "*agencies in the United States and* branches or agencies in foreign countries." 58 Cong. Rec. 7854, 7856 (1919) (emphasis added). This version of the bill was debated in the House, where Representative Platt, chairman of the Banking and Currency Committee and floor manager of the bill, insisted repeatedly that it did not allow the operation of domestic branches by Edge corporations. See *id.* at 7856 (colloquy between Reps. Haugen and Platt); *ibid.* (remarks of Rep. Platt); *id.* at 7857, 8100 (remarks of Rep. Platt). Indeed, Representative Platt opposed an amendment that would have expressly prohibited domestic branching "because there is no authorization for branch banks in there. We have provided that branches shall only be established in foreign countries, and I do not see any reason to put anything else in." *Id.* at 7857.[8] See *id.* at 8100 (remarks of Rep. McFadden).

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[7] A predecessor bill would have permitted a proposed Foreign Finance Corporation to establish "branches or agencies in any city or cities of the United States or any foreign country." *Hearings on S. 2472 Before the Senate Comm. on Banking and Currency,* 66th Cong., 1st Sess. 27 (1919). This suggests that the omission of similar language from the Edge Act was intentional.

[8] It was when the bill was in this form—expressly permitting the operation of domestic agencies—that Representative Platt made the remark, relied upon by appellant (J.S. 14), that

> If the gentleman is going to have people in Iowa properly served by these banks, they would want an agency there.
>
> * * * * *
>
> * * * That is not a branch, and these are not banks. If the gentleman does not want his people properly served by a local

Despite these comments, the House committee version of Section 615(b) was amended on the floor to provide expressly that Edge corporations could establish "agencies *but not branches* in the United States and branches or agencies in foreign countries" (58 Cong. Rec. 8102 (1919) (emphasis added)). See *ibid.* (remarks of Rep. Cannon); *ibid.* (remarks of Rep. Platt). The language added to the Senate version of Section 615(b) both by the House committee and on the House floor was deleted in conference, however; the Senate conferees noted that the House amendments "provided that these banking corporations might establish agencies in the United States. The Senate committee objected to that, and the House receded." 59 Cong. Rec. 111 (1919).

In explaining this change to the House, Representative Platt observed that "[t]here was a good deal of discussion as to whether an agency and a branch were the same thing, and we finally struck it out, although personally I think institutions of this kind should be allowed not only agencies but branches. * * * But the matter seemed not of great enough importance to insist upon, and we yielded." 59 Cong. Rec. 49 (1919). In response to a question, however, Representative Platt added that the deletion of the House language "will put [Edge corporations] on the same basis with national banks. National banks do have correspondents, and I suppose the law would be construed in the same way, probably." *Ibid.* When asked whether "[t]hat will give [Edge corporations] practically agencies to do whatever business they want to do outside of their own

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agency they would have to go to New York every time they did business. * * * These financial institutions either are to have agencies or else his people will have to go to Wall Street everytime they do business with them.

58 Cong. Rec. 7857 (1919).

cities, will it not?" (*ibid.* (remarks of Rep. Hicks)), Representative Platt responded: "Very likely. We have simply stricken out all reference to it, on account of the disagreement as to the terms that were used." *Ibid.*

Given the clear congressional opposition to domestic branching by Edge corporations—as well as the fact that Section 615(b) as adopted treats branches and agencies alike—Representative Platt's statement to the House that Edge corporations "[v]ery likely" would be permitted to operate agencies seems inconsistent with the Senate's action in striking the House language (expressly authorizing domestic agencies) from the bill. As explained by Representative Platt, however, the Senate conferees seem to have been primarily concerned that Edge corporations might establish branches in the guise of agencies. He therefore concluded that there was no objection to Edge corporations operating in the same manner as national banks. At the time, those banks were not permitted to branch at all. But the restriction on branching did not prevent the creation by a bank of " 'a mere agency for the transaction of a particular business,' " as opposed to " 'a branch bank wherein is carried on a general banking business.' " *Clarke* v. *Securities Industry Ass'n,* No. 85-971 (Jan. 14, 1987), slip op. 16 (quoting *Lowry Nat'l Bank,* 29 Op. Att'y Gen. 81, 87 (1911)). See *First Nat'l Bank* v. *Missouri,* 263 U.S. 640, 658 (1924); *Merchants' Bank* v. *State Bank,* 77 U.S. (10 Wall.) 604, 651 (1870). The best guess is that it was on Representative Platt's understanding that the House passed the bill as modified in conference. It is hard to make any guess at all as to the Senate's expectations.

c. In our view, the fairest reading of this history is that Section 627 should not be interpreted to preclude taxation of out-of-home-state Edge corporation offices by the states in which those offices are located. The only discus-

sion of the desirable scope of state taxation took place in the Senate, where there was general agreement (expressed most notably by Senator Edge himself) that Edge corporations should "be taxed in every way that any other similar corporation is taxed" (58 Cong. Rec. 4969 (1919) (remarks of Sen. Edge)). Senator Edge and many of his colleagues were also of the view that Edge corporations would be subject to full state taxation in the absence of any contrary statement. The Senate version of Section 627 accordingly was added simply "to make it doubly sure, * * * inasmuch as no one wants [Edge corporations] to excape any taxation, State or Federal" (58 Cong. Reg. 4969 (1919) (remarks of Sen. Edge)). It is true, as appellant observes (J.S. 17), that the Senate version was replaced by a House substitute containing the "home office" state language. But the Senate conferees—while objecting to a portion of the House amendment dealing with taxation of nonresident shares—accepted the House substitute without complaint. This action suggests that the House amendment was not perceived to alter the basic effect of the Senate version.

Given this history, Section 627 seemingly was intended only to insure that Edge corporations would be subject to some state tax in the event that they were otherwise held immune from state taxation under the Supremacy Clause. Since, as we explain above, Edge corporations have no such constitutional immunity, appellant is correct in noting (J.S. 10) that this reading of Section 627 renders the provision largely superfluous. But that would not have surprised the enacting Congress: Senator Edge himself was of the view that Section 627 was unnecessary to permit state taxation, and he agreed to the provision's enactment simply "to make it doubly sure."

When Section 627 was enacted, Congress plainly did not have in mind extensive interstate operations by Edge corporations. It firmly rejected the prospect of domestic branching by those corporations.[9] And while there is some evidence that Congress anticipated the creation of Edge corporation agencies (an activity that was in fact authorized by the Board in the 1920 version of Regulation K), Representative Platt—himself an advocate of branching by Edge corporations—concluded that "the matter seemed not of great enough importance to insist upon" (59 Cong. Rec. 49 (1919)).

Against this background, it appears that Congress made Edge corporations "subject to tax by the State[s] within which [their] home office[s] [are] located" (12 U.S.C. 627) simply to insure that those corporations would be taxable by *some* state in the event that the courts found a constitu-

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[9] Contrary to appellant's suggestion (J.S. 9), this observation does not mean—and the court below did not hold—that the Board acted beyond its statutory authority when it modified Regulation K to permit branching by Edge corporations after the enactment of the IBA in 1978. Section 3(a) of the IBA directed the Board to eliminate regulatory provisions that "disadvantage[d] or unnecessarily restrict[ed] or limit[ed] [Edge] corporations"; Section 3(b) expressed a congressional intent to give Edge corporations "powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad." 92 Stat. 608. At the same time, Section 4 expressly permitted foreign banks to establish branches in the United States. 92 Stat. 612. Whether this enactment authorized the Board to permit domestic branching by Edge corporations is not at issue in this case, but the argument that Congress in 1919 did not anticipate extensive interstate operations by Edge corporations does not imply that the Board is not now authorized to permit domestic branching. See Kelly, *Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks*, 20 Va. J. Int'l L. 37, 45 (1979).

tional immunity. Because Congress did not envision extensive multi-state operations by Edge corporations, that reference to a single state need not be read as indicating an intention to foreclose other constitutionally permissible state taxes. While Congress's choice of language does not leave the matter entirely free from doubt, on balance we believe that the Court of Appeals gave the best answer to the question here.[10]

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[10] We note that appellant's reading of Section 627 might lead to the conclusion that the income of Edge corporation branches located outside the home office state could not be taxed by *any* state—including the one in which the home office is located. It is doubtful that Section 627 can authorize home state taxation to an extent not permitted by the Due Process Clause of the Fourteenth Amendment. But the Court has made it clear that the Clause "imposes two requirements for such state taxation: a 'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.' " *Exxon Corp.* v. *Department of Revenue,* 447 U.S. 207, 219-220 (1980) (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes,* 445 U.S. 425, 436, 437 (1980)). Even if the Edge corporation and its branches are a unitary business—so that corporate income from all sources, wherever located, may be taken into account in determining the income that may fairly be apportioned to the taxing state—"the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp. of America* v. *Franchise Tax Board,* 463 U.S. 159, 169 (1983). The Court thus "will strike down the application of an apportionment formula if the taxpayer can prove 'by "clear and cogent evidence" that the income attributed to the State is in fact "out of all appropriate proportions to the business transacted . . . in that State" ' " (*id.* at 170 (citations omitted)). And in setting down these rules, the Court has not insisted that the taxpayer demonstrate the existence of actual dual taxation. It therefore is not clear that the due process "nexus" and "rational relationship" requirements should be deemed satisfied, and that income from all geographical sources accordingly should be subject to tax by the home office state, simply because congressional action precludes any taxation by other states.

CONCLUSION

The motion of appellee to dismiss or affirm should be granted.

Respectfully submitted.

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APRIL 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60408